

D.P.U. 92-254

In the Matter of the Petition of Boston Gas Company for an Exemption
from the Zoning By-Laws of the Town of Danvers

APPEARANCES: James Connelly, Esq.

Boston Gas Company

One Beacon Street

Boston, Massachusetts 02108

FOR: BOSTON GAS COMPANY

Petitioner

I. INTRODUCTION

On November 19, 1992, the Boston Gas Company ("Boston Gas" or "Company") petitioned the Department of Public Utilities ("Department") under G.L. c. 40A, § 3, for an exemption from the zoning by-laws of the Town of Danvers ("Danvers") for the purpose of

relocating propane tanks underground at an existing peak-shaving propane facility ("Danversport facility"). The petition was docketed as D.P.U. 92-254.

The Danversport facility is presently categorized as a pre-existing nonconforming use due to a previous change in the Danvers by-laws removing public utility structures and appurtenances as a permitted use in an Industrial I zone. In September 1992, the Company was denied a building permit from the Danvers building inspector based on the rationale that any change to a pre-existing non-conforming use requires approval by the Danvers Zoning Board of Appeals ("ZBA").

The Danversport facility is used for supplemental supply of the Company's gas distribution system during colder periods, and operates via a propane-air process

(Tr. at 24-25). Boston Gas presently operates one major air-propane facility in Everett, Massachusetts, and ten satellite facilities including the Danversport facility. See Boston Gas Company, 25 DOMSC 116, 210 (1992). The Company proposes to bury four existing tanks used for propane storage half way below grade, covering the upper half of the tanks by mounding soil approximately one foot thick (Exh. BGC-1, at 6).

II. PROCEDURAL HISTORY

After due notice, the Department held a public hearing on the petition at the Danvers Town Hall on February 10, 1993. Joseph Toner, manager, gas production and control operations for Boston Gas, presented a summary of the petition. Four individuals, including one area resident and three elected officials, commented on the proposal and generally supported Department approval of the petition to

enhance the safety of the facility. Concerns raised at the public hearing were: (1) the Company's circumvention of the zoning by-law; (2) the need for improved landscaping; (3) avoidance of traffic on adjacent residential streets; (4) safety issues; and (5) maintenance of a secure site during construction (Tr. at 16, 49, 52).

No petitions to intervene were filed. The Hearing Officer moved 13 exhibits into the record, consisting of responses to information requests. The Company entered 4 exhibits into the record.

III. STANDARD OF REVIEW

In its petition for a zoning exemption, the Company seeks approval under

G.L. c. 40A, § 3, which, in pertinent part, provides:

Land or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the [D]epartment of [P]ublic [U]tilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public...

Under this statute, the Company must qualify as a public service corporation. See Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975)). In addition, the Company must demonstrate that its proposal (1) requires exemption from the local zoning by-laws, and (2) is reasonably necessary for the public convenience or welfare. The phrase "public convenience and necessity" has been interpreted to mean the "public benefit, good or interest." Wolf v. Department of Public Utilities, 407 Mass. 363, 369-70 (1990);

Zachs v. Department of Public Utilities, 406 Mass. 217, 224 (1989). In determining whether a proposed use conforms with this standard, the Department must balance the interests of the general public against the local interest. Save the Bay, Inc., 366 Mass. at 685-686; Town of Truro v. Department of Public Utilities, 365 Mass. 407 (1974). Specifically, the Department is required to undertake a "broad and balanced consideration of all aspects of the general public interest and welfare and not merely [make an] examination of the local and individual interests which might be affected." New York Central Railroad v. Department of Public Utilities, 347 Mass. 586, 592 (1964).

When evaluating a petitioner's proposal for a zoning by-law exemption, the Department is required to determine whether that proposal is reasonable. G.L. C. 40A, § 3 does not require a petitioner to prove that its preferred proposal is the best possible one. Martarano v. Department of Public Utilities, 401 Mass. 257 (1987); New York Central Railroad Company, 347 Mass. at 591. The availability of alternative sites is pertinent only as a matter of fact bearing upon the main question of whether the proposed site is reasonably necessary for the convenience or welfare of the public. Martarano v. DPU, 401 Mass. at 266. Accordingly, the Department reviews a zoning by-law exemption petition to determine whether use of the petitioner's proposed site is reasonably necessary for the convenience or welfare of the public." Id.

IV. DESCRIPTION

Boston Gas stated that it is necessary to maintain the Danversport facility to supplement pipeline supplies due to pipeline capacity constraints on peak demand days (Exh. BGC-1, at 3). The Company explained that peak demand occurs on exceptionally cold

winter days due to the demand for space-heating (id.). The Company indicated that relocating the existing tanks at the facility would not result in any significant change in the character, manner, or scope of the present use of the Danversport site (Exh. DPU-7). Boston Gas stated that it would not be increasing the capacity of the Danversport facility since it would be using the existing tanks and the storage volume would remain the same (Tr. at 25).

The Company stated that upgrading the Danversport facility by placing the storage tanks underground and mounding them over with soil enhances safety, reducing the risk of fire to a virtual minimum (Exh. BGC-1, at 5; Tr. at 26). The Company stated that while the existing facility is currently safe, it wants to further enhance facility safety and operation by installing state-of-the-art equipment (id.; Tr. at 22). Boston Gas explained that there are now devices to provide corrosion protection which did not exist in the past, and therefore it is now feasible to bury the tanks (Tr. at 42).

Boston Gas stated that it would recondition and recertify the tanks prior to placing them below ground (Tr. at 25, 49).¹ In addition to reconditioning the tanks, the Company proposed the following equipment changes: upgrading the interior unloading station and roadway, replacing the remote and emergency shutdown valves, and installing new lighting, gas and fire detection, intrusion detection, and instrumentation and control systems (Exh. DPU-2).

¹/ Boston Gas described reconditioning as including cathodic protection, adding new penetrations to allow piping to enter and exit the tanks from the top, preparing the exterior of the tanks with a mastic coating, and hydrostatically testing the tanks (Exh. DPU-3).

Boston Gas indicated that the visual impact of the Danversport facility would be reduced by decreasing the visibility of the tanks (id., at 6). The Company stated that presently the tanks are located 15 feet above grade, but that when the tanks are placed below ground, the earthen mound would rise only six feet above grade (id.).

Boston Gas stated that work at the Danversport facility would be undertaken by individuals skilled in upgrade and configuration work and further, that work would conform to the Massachusetts Gas Distribution Code, 220 CMR 100, assuring adherence to engineering and safety regulations (Exh. BGC-1, at 4). The Company indicated that the Danvers Fire Department is in support of the project (Tr. at 34). In addition, the Company noted that it had recently conducted a similar upgrade of a peak-shaving facility in Southbridge, whereby three tanks were successfully moved underground (id.). Boston Gas also indicated that storing the tanks underground does not present an environmental hazard since propane vaporizes upon release from the tank to atmospheric pressure (id., at 27).

The Company estimated that construction on-site would take two to three months to complete (Exh. BGC-1, at 5). Mr. Toner stated that construction would be managed such as to minimize disruption to the neighborhood,² and would be undertaken during normal business hours (Tr. at 17). Boston Gas stated that the work would be scheduled Monday through Friday between 7 a.m. and 7 p.m. (Exh. DPU-8). The Company further indicated that the amount of traffic associated with the construction

^{2/} Public testimony during the hearing characterized the surrounding neighborhood as a densely settled residential neighborhood (Tr. at 50). Department staff conducted a site visit of the facility and concurs with this assessment. The facility is located on Broad Street, which is residential in nature.

work would be limited to a small number of workers in the morning and evening, and stated that the arrival of heavy equipment at the site would occur on only a few days (Exh. DPU-9). Finally, the Company stated that all construction and delivery traffic would be restricted from utilizing the Broad Street entrance (Exh. DPU-12).

Boston Gas provided two possible routes for construction traffic to travel from Route 128 to the site (Exh. BGC-9). The first alternative would enter a service road to the Devcon Company ("Devcon roadway")³ from the opposite direction on Appleton Street, thereby travelling the entire length of Appleton Street (Exh. DPU-10). A dirt right-of-way, owned by Boston Gas with an easement deeded to Tennessee Gas Pipeline Company, is located off of the Devcon roadway and leads to a back entrance to the Danversport facility (Exh. DPU-10; Tr. at 18). The second alternative would travel along a major road, Endicott Street, entering the Devcon roadway via a right turn (Exh. BGC-9). Both routes would enter the facility through the Devcon roadway and the dirt right-of-way, which is presently used as the route for bringing propane into the facility (Exh. DPU-10; Tr. at 18).

V. ANALYSIS AND FINDINGS

G.L. c. 40A, § 3, authorizes the Department to grant to public service corporations exemptions from local ordinances or by-laws when the proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public. Boston Gas is a gas company as defined by G.L. c. 164, § 1, organized for the purpose of making and selling, or distributing and selling, gas within the Commonwealth.

³/ The Devcon roadway begins at the entrance to Appleton Street south of Endicott Street and immediately veers to the right off of Appleton Street extending to the Devcon Company.

Accordingly, the Company qualifies as a public service corporation and is eligible to petition the Department for an exemption from local zoning by-laws pursuant to G.L. c. 40A, § 3.

Based on the record in this proceeding, the Department determines that, under G.L. c. 40A, § 3, the burial of the propane tanks and upgrade of the facility would serve the public convenience and welfare and is consistent with the public interest by enhancing the safety of the Danversport facility. The facility has previously been found to be a component of a supply plan necessary to provide reliable service to the Boston Gas service territory. See Boston Gas Company, 25 DOMSC at 222. In addition, the proposed actions would not cause any additional environmental impacts, would comply with all safety requirements, and would in fact lessen current visual impacts.

With regard to construction activities, we note that the abutting neighborhood is predominantly residential. The Company submitted two alternative routes for construction vehicles to travel from Route 128 to the site. The second alternative route bypasses the residential area by utilizing the Devcon roadway via Endicott Street. Utilization of this route would be in conformance with a past agreement by the Company that propane trucks are not to enter the facility through the Broad Street entrance (Tr. at 22). The first alternative, while also avoiding the Broad Street entrance, would require construction vehicles to travel through the neighborhood on Appleton Street. As Appleton Street is also a residential road and parallels Broad Street, the same attention to avoiding travel through a residential area should apply. Therefore, the Department orders Boston Gas to direct its construction traffic to enter the Devcon roadway from Endicott Street, consistent with the second alternative route.

In addition, in light of the fact that the Company stated that construction would be undertaken during normal business hours, the Department interprets these hours to be between 7 a.m. to 5 p.m. This schedule would take into consideration the residential nature of the abutting neighborhood and would minimize intrusions into the evening hour.

Accordingly, the Department finds that Boston Gas' proposed reconfiguration of the propane tanks is reasonably necessary for the convenience or welfare of the public. The Department further finds that the proposed reconfiguration of the propane tanks require an exemption from the zoning by-laws of the Town of Danvers.

VI. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That the petition of Boston Gas Company, pursuant to G.L. c. 40A, §3, be allowed and that the proposed reconfiguration of the facilities, as described in the Company's exhibits on file with the Department, be exempt from the operation of the zoning by-laws of the Town of Danvers, insofar as the zoning by-laws may preclude relocation of the propane tanks underground; and it is

FURTHER ORDERED: That the Company direct construction traffic to enter the facility via the Devcon roadway traveling from Endicott Street and limit the hours of construction to between 7 a.m. and 5 p.m.; and it is

FURTHER ORDERED: That the Company shall obtain all other government approvals necessary for this project before its construction commences; and it is

FURTHER ORDERED: That the Secretary of the Department shall transmit a certified copy of this Order to the Town Clerk of the Town of Danvers; and that Boston Gas Company shall serve a copy of this Order upon the Conservation Commissions, Planning Boards, and Boards of Selectmen of the Town of Danvers within five business days of its issuance and shall certify to the Secretary of the Department within ten business days of its issuance that such service has been accomplished.

By Order of the Department,